



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: CWA - 175366

PRELIMINARY RECITALS

Pursuant to a petition filed on July 2, 2016, under Wis. Admin. Code § HA 3.03, to review a decision by the Washburn County ADRC regarding Medical Assistance (MA), a hearing was held on September 20, 2016, at Eau Claire, Wisconsin. A hearing scheduled for August 10, 2016, was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner is functionally eligible for Medical Assistance-Waiver benefits that require that he meet the nursing home level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
Washburn County ADRC
850 W Beaverbrook Av, Suite #4
Spooner, WI 54801

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Washburn County.

2. The department determined that the petitioner does not meet a Medical Assistance-Waiver target group and he is not functionally eligible for benefits.
3. The petitioner's full scale IQ is 59.
4. The petitioner has been incarcerated throughout much of his life.
5. The petitioner continued until recently to use alcohol and methamphetamines.
6. The petitioner has a representative payee. He cannot adequately budget his money.
7. The petitioner gets meals through Meals on Wheels to ensure that he gets one hot meal a day.
8. The petitioner has a driver's license and can drive, but his car is impounded due to his drug abuse. He rides a bicycle around town
9. The petitioner can text but cannot carry on conversations on his cell phone..

DISCUSSION

The department determined that the petitioner does not meet one of the Medical Assistance-Waiver program's target groups and that the level of care he requires is not functionally equivalent to that found in a nursing home. I note that I cannot find anything in the file or testimony that explaining exactly what program the petitioner is seeking to enroll in. Nor can I find any letter from the department denying benefits to him. I should have asked about this at the hearing, but I did not notice these problems until I started writing my decision.

To meet one of the three target groups he must either have a physical disability, be a frail elder, or have a developmental disability. Wis. Admin. Code, § DHS 10.32(1)(c). Although he has a hearing deficit, his primary problem is his limited cognitive ability, which is related to cerebral palsy. This means that he must establish that he has a developmental disability. MA-Waiver regulations define this as a "disability attributable to...cerebral palsy..., mental retardation, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mental retardation, that has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual." Wis. Admin. Code, § DHS 10.13(16).

Mental retardation is not defined in Chapter 10 of the Wisconsin Administrative Code. The department contends that the petitioner must meet the federal definition of "mentally retarded." The *MA Waiver Manual* § II.A., refers to "developmental disability," which it defines as a "severe, chronic disability" that is attributable to mental or physical impairments that began before the person turned 22 years old, is likely to continue indefinitely, and results in a substantial limitation of three or more of the following seven areas:

- a. Self care
- b. Receptive or expressive language
- c. Learning
- d. Mobility
- e. Self direction
- f. Capacity for independent living
- g. Economic self-sufficiency,

The petitioner has cerebral palsy, which has led to limited intellectual functioning and poor hearing. His IQ was recently tested and determined to be 59, a level that by itself establishes an intellectual disability for social security purposes. *See Social Security regulations* at 20 CFR Appendix 1, § 12.05B. He has been incarcerated throughout much of his life and has continued to use alcohol and methamphetamines.

He has a representative payee. He has been able to live on his own only when he has frequent assistance from others. Based upon this, I find that he has substantial limitations in learning, self-direction, capacity for independent living, and economic self-sufficiency. Therefore, he meets the developmental disability target group.

Because he meets one of the program's target groups, he must establish that he remains functionally eligible for the program by meeting the nursing home level of care. The nursing home level of care, which is also referred to as the comprehensive level of care, is described as follows at Wis. Admin. Code, § DHS 10.33(2)(c):

A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Activities of daily living, or ADLs, refer to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Admin. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site." Wis. Admin. Code, § DHS 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the department. Wis. Admin. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. *See DHA Decision No. FCP-44/115906*. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The petitioner has a cognitive impairment but there is no evidence that his developmental disability requires specialized services. In addition, because he has no significant physical problems other than his hearing loss, he can perform all of his activities of daily living without assistance. This means he must

establish that he cannot safely or appropriately perform four or more independent activities of daily living.

The department contends that he can adequately prepare meals, something it finds as long as the person can put food in the microwave. I disagree. He receives food every day from Meals on Wheels because he cannot ensure he will receive adequate nutrition otherwise. Based upon this, I find that he cannot appropriately obtain nutrition without assistance.

It also contends that despite having a representative payee, he can manage his money because he answered basic questions about doing so. His history indicates otherwise. He overspends and uses his money on foolish things. He may be able to answer simple questions about finances such as giving change, but he has shown no ability to perform the day-to-day budgeting one must do to make his paycheck last from the beginning to the end of the month. Therefore, I find that he also cannot perform this activity appropriately.

Because of his hearing loss, he cannot carry on regular conversations on the telephone .The department contends that this does not matter because he can and does text. But texting does not replace conversations in all areas. For example, when calling a business or government office for information, it is often necessary to carry on a regular conversation. And because most office telephones are still landlines, texting is not available. I find that his hearing loss prevents him from appropriately using the telephone.

Given his history, there is little evidence that he could function appropriately at a job site. Those testifying on his behalf indicated that he requires close and constant structure and supervision in almost everything he does. He receives disability payments because of his mental limitations, and it is doubtful that he could follow any but the most limited instructions.

I find that the petitioner cannot perform at least four instrumental activities of daily living appropriately. This means that he meets the nursing home level of care. I will remand this decision to the agency with instructions that it find him eligible for whatever program he has applied and for and this finding entitles him to.

CONCLUSIONS OF LAW

The petitioner is functionally eligible for MA-Waivers programs that require that he meet the nursing home level of care.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it find the petitioner eligible for MA-Waivers at the nursing home level of care and that it process whatever application he has on file consistent with that determination. If the petitioner disagrees with the agency's next action, he may file a new appeal.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

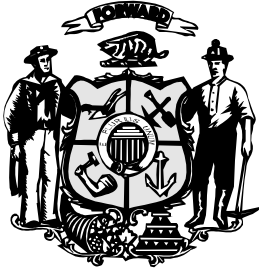
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 25th day of October, 2016

\s _____
Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 25, 2016.

Washburn County ADRC
Bureau of Long-Term Support

